

**MINORITY MEDIA AND
TELECOMMUNICATIONS COUNCIL**

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Improving Commission) PP Docket No. 96-17
Processes)

REPLY COMMENTS

The Minority Media and Telecommunications Council ("MMTC") respectfully replies to the March 15, 1996 Comments of the National Association of Broadcasters ("NAB").

NAB proposes that the Commission develop a "self-certification" program for "applications not involving engineering/interference matters (e.g. transfer or assignment applications)." NAB Comments at 3-5.

Engineering compliance is easily verified, since engineering lends itself to quantifiable, objective, bright-line compliance tests. But in no area of regulation has non-technical "self-certification" ever proven effective. From its experience with self-certified financial certifications, the Commission knows all too well what a disaster a "box checking" regime can be.^{1/}

^{1/} E.g., Mableton Broadcasting Company, Inc.,
5 FCC Rcd 6314, 6322 (Rev. Bd. 1990).

EEO is the only material non-technical matter regularly arising in connection with renewal, assignment and transfer applications. EEO compliance is hardly a suitable subject for self-certification.

No broadcaster, even the worst discriminator or EEO violator, is likely to check a box self-certifying lack of compliance. If EEO compliance is reduced to box-checking, neither the Commission nor any member of the public would have a hint as to who might not be in compliance.

Consequently, EEO "self-certification" would be a backdoor way to put an end to EEO enforcement. Perhaps that is not the NAB's intention, but that would be the effect of its proposal.

Some broadcasters do not know why they are subject to FCC EEO regulation. Their puzzlement is understandable when "only a tiny number of broadcasters are ever adjudged guilty of any actual discrimination."^{2/} But the reason so few broadcasters are found "guilty of any actual discrimination" is that the Commission too often blinds itself to signals that facially irrational or racially stereotypic behavior by a licensee might really be a mask for discrimination.^{3/} In no such case has any

^{2/} Testimony of John Barger, on behalf of the Texas Association of Broadcasters, before the House Subcommittee on Telecommunications, March 28, 1996.

^{3/} For example, broadcasters sometimes contend that close-in suburbs are too far for "commuting in reverse" by city-dwelling minorities, e.g., WXBM-FM, Inc., 6 FCC Rcd 4782, 4784 ¶15 (1991) and Miami Renewals, 5 FCC Rcd 4893, 4898 (1990). Some broadcasters indulge the view that minorities would not want to, or are not capable of, working in certain radio formats, e.g., The Lutheran Church/Missouri Synod (HDO), 9 FCC Rcd 914 (1994). Some eschew meaningful EEO compliance efforts in the belief that minorities require higher salaries than Whites, or that women are difficult to retain on the job because of pregnancy, divorce and the like, see KEZE Radio, 44 RR2d 1527 (1978).

licensee indulging in such behavior ever "self-certified" that its behavior is anything but a good faith attempt to comply with both the nondiscrimination and affirmative action components of the EEO Rule. Discriminators are simply not good judges of whether they are discriminating.

The hearing rights provided by Section 309(e) of the Act provide a robust assurance that no nondiscriminator will ever be unjustly found guilty of discrimination. However, no one can seriously argue that the Commission's EEO enforcement efforts catch most discriminators. Over the past 25 years of EEO enforcement, the Commission has caught almost none of them. Only five HDO's containing EEO issues were issued in the 1970's, two in the 1980's, and three in the 1990's. It has been over two years since the Commission designated any renewal application for hearing on an EEO issue. Although it is difficult to imagine how it could become even more difficult to prove up an EEO case at the Commission, a regime of box-checking would indeed make it immeasurably more difficult to do so. What would a petitioner to deny begin in order to show that a renewal or transfer/assignment^{4/} applicant is unqualified?

^{4/} The NAB's focus on transfer/assignment applications is troubling. In business, most long-range decisions on the manner with which EEO is handled are made by new owners at the time they assume stewardship. Policy decisions which deprive minorities and women of job opportunities can be reversed at renewal time, but by then, the staff's expectations and job tenure have become entrenched. It is far easier, more efficient, and more fair to implement a strong EEO compliance program at the beginning of a company's stewardship than in the middle.

Employment discrimination in American industry continues to be widespread.^{5/} Nobody seriously believes that broadcasters are any more or less imbued with morality than other segments of society.^{6/} Indeed, if the Commission wants to know what the broadcasting industry would look like under EEO "self-certification" it need look no further than the station brokerage industry -- not one of whose members has ever hired or trained a minority to be a broker.

This is hardly the time for weaker and more ineffectual EEO enforcement. Thanks to the loss of the tax certificate policy, and the virtual abandonment of structural regulation attendant to the Telecommunications Act, the EEO Rule stands as the Commission's last remaining tool for promoting diversity. As the Commission correctly recognized last month, "employment discrimination in the broadcast industry inhibits our efforts to diversity media ownership by impeding opportunities for minorities and women to learn the operating and management skills necessary to become media owners and entrepreneurs."^{7/}


^{5/} A number of experiments conducted between 1989 and 1993 by the Lawyers Committee for Civil Rights and the NAACP, involving pairs of "testers", each applying for the same jobs on the same days in a variety of industries, found that about 20% of employers discriminate. No employer openly announces that he discriminates.

^{6/} Indeed, through the comparative hearing policies, broadcasters are ostensibly selected so as to embody a diverse cross-section of society, rather than just an unrepresentative elite. After winning construction permits, broadcasters who sell their stations seek out those with whom they are comfortable doing business -- usually through station brokers. Few would argue that the EEO-unregulated station brokerage business, composed of 150 White brokers and one independent Hispanic broker, is effective in keeping discriminators out of the broadcasting business.

^{7/} Streamlining Broadcast EEO Rules and Policies, FCC 96-49 (released February 16, 1996) at 3 ¶3 (fn. omitted).

MMTC has long urged the Commission to adopt a Zero Tolerance policy toward possible discrimination, under which it should leave no stone unturned in order to assure itself, when it issues a license renewal, assignment or transfer application, that there can be absolutely no hint of discrimination in the past, present or future operation of a broadcast station. While self-certification has its place, "non-technical" self certification would be nothing but a license to discriminate.

Respectfully submitted,



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March 29, 1996

CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 29th day of March, 1996 caused a copy of the foregoing "Reply Comments" to be delivered via U.S. First Class Mail, postage prepaid, to the following:

Henry L. Baumann, Esq.
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